cuted by respondent with other lessees who were not parties to the proceedings.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 470.]

Error to Law and Equity Court of City of Richmond.

Separate petitions by Bill Mangigian and others and by Aristea Kosmo against E. C. Levy, Director of Public Welfare of the City of Richmond. From orders granting the prayer of the petition in each case, the respondent brings error. Appeals dismissed.

Ordway Puller, E. V. Farinholt, and *H. R. Pollard,* all of Richmond, for plaintiff in error.

T. Gray Haddon, of Richmond, for defendants in error.

DU PONT ENGINEERING CO. *v.* BLAIR.

March 17, 1921.

[106 S. E. 328.]

1. Pleading (§ 430 (2)*)—Variance Waived by Failure to Object.—In employee's action for personal injuries, the employer waived variance between the declaration pleading negligence in failure to provide employee safe place in which to work and proof of negligence in failure to warn inexperienced employee of danger incident to the work by failure to make timely objection to variance under Code 1919, § 6250, where, if such objection had been made, the declaration could have been amended so as to conform to the theory that the negligence consisted in the failure to warn employee instead of the failure to provide safe place to work.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 552, 553.]

2. Pleading (§ 387*)—Proof Must Correspond to the Allegations.—Proof must correspond to the allegations.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 271.]

3. Master and Servant (§ 289 (9)*)—Contributory Negligence of Operator of Hoisting Machinery Held for Jury.—In an action for injuries to an employee struck by a shell which fell from an overhead track, after he had been engaged in elevating shells with the machinery for several hours, the question of contributory negligence held for the jury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 726.]

4. Master and Servant (§ 288 (11)*)—Assumption of Risk by Operator of Hoisting Machinery Held for Jury.—In an action for injuries to an employee struck by a shell which fell from an overhead track after

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

he had been engaged in elevating shells with the machinery for several hours, the question of whether he assumed the risk held for the jury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 726.]

5. Evidence (§ 244 (7)*)—Declarations of Employer's Head Safety Man Admissible in Action for Injuries to Servant.—Testimony as to statement by the head of employer's safety department that the employer had had a great deal of trouble with the machinery at which plaintiff had been working at time of injury held admissible as against objection that the employer was not bound thereby.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 724, 725.]

6. Master and Servant (§ 264 (4)*)—Testimony as to Defective Hoisting Held Admissible under Pleading.—In an action for injuries to an employee struck by a shell which fell from an overhead track, complaint alleging that employer negligently furnished a defective air pressure elevator with which to work held to warrant admission of expert testimony as to whether the shell would have fallen if the machine had not been defective.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 724, 725.]

7. Appeal and Error (§ 1050 (2)*)—Erroneous Admission of Evidence Harmless in View of Issue.—In action for injuries to employee struck by heavy shell which had fallen from overhead track suspended from ceiling, in which the only issu was whether the failure of the employer to warn and instruct employee as to the danger incident to his work was the proximate cause of the accident, the admission of testimony that the accident could not have taken place if the machine had not been defective, if error, was harmless.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 595.]

8. Appeal and Error (§ 1066*)—Instruction Held Harmless in View of Issue.—In action for injuries to employee in which only issue was whether employer failed to properly warn and instruct employee with reference to the proper operation of machine at which he was working at time of injury, instructions as to master's duty to provide servants with reasonably safe machinery, though not appropriately worded, held harmless.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 601.]

9. Trial (§ 252 (1)*)—Instructions Should Be Applicable to Evidence.—Instruction should be applicable to the evidence and the giving of instructions not applicable thereto, if the jury is misled thereby, constitutes reversible error.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 718.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Circuit Court, York County.

Action by Nicholas M. Blair against the Du Pont Engineering Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Henley, Hall, Hall & Peachy, of Williamsburg, and *Plummer & Bohannan,* of Petersburg, for plaintiff in error.

E. V. Farinholt and *David Meade White,* both of Richmond, for defendant in error.

FIELDS *v.* COMMONWEALTH.

March 17, 1921.

[106 S. E. 333.]

1. Homicide (§ 140*)—Indictment for Attempt to Murder Held Sufficiently to Charge Overt Acts.—Indictment charging that accused did feloniously attempt to commit the crime of murder by discharging and shooting off a pistol at and towards another, etc., held sufficiently to charge the overt acts done toward commission of the offense.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 129.]

2. Homicide (§ 131*)—Indictment Sufficiently Informed Accused of Person upon Whom Attempt Made—Indictment charging an attempt to commit the crime of murder by discharging a pistol at another held sufficiently to inform accused whether she was charged with attempt to murder the person named or some one else.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 130.]

3. Homicide (§ 139*)—Indictment for Attempt to Commit Murder Not Invalid for Failure to Specify Degree.—Indictment charging attempt to commit the crime of murder by discharging a pistol at another held not invalid because failing to specify that the murder alleged to have been attempted was murder in the first degree.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 129.]

4. Homicide (§ 9*)—Intent to Kill Essential Element of First Degree Murder.—The intent to kill is an essential element of the crime of murder in the first degree.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 118.]

5. Homicide (§ 128*)—Indictment for Murder Need Not Allege Intent to Kill.—An indictment for murder need not expressly allege the intent to kill, and an indictment for murder at common law which does not expressly charge such intent is valid and sufficient to support verdict of murder in the first degree, if the evidence is sufficient to establish the murder was of such degree.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 130.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.